

STATE OF MONTANA

IBLA 76-339 Decided November 16, 1976

Appeal from a decision of the Montana State Office, Bureau of Land Management, rejecting a protest to an assertion by the United States of ownership of the mineral interest in the bed of Big Lake riparian to Lots 1, 2, 3, and 4 in section 36, T. 2 N., R. 21 E., P.M., Montana.

Affirmed.

1. Lieu Selections--School Lands: Generally--Public Lands: Riparian Rights

The acceptance by a State of other lands as indemnity for lands lying within the meander line of a non-navigable lake adjacent to the granted upland school section, was a relinquishment of any interest in the adjacent land underlying the lake as an incident to the grant of the school section to the extent such land lies within the linear boundaries of the school section, and precludes the assertion of a State claim to such lands.

APPEARANCES: Alan Joscelyn, Esq., Staff Counsel, Department of State Lands, State of Montana.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

On July 21, 1975, one Betty L. Provinse filed noncompetitive oil and gas lease offer M 31922, embracing lands within the bed of Big Lake riparian to Lots 1, 2, 3, and 4 in section 36, T. 2 N., R. 21 E., P.M.M. On July 24, 1975, one M.F. Trask filed noncompetitive oil and gas lease offer M 31965, embracing lands within the bed of Big Lake located in sections 24, 25, 26, and 35, T. 2 N., R. 21 E., P.M.M. There was a conflict between the two applications as regards a piece of land in section 25 which was riparian to the lots in section 36.

Section 36 was, of course, a school land section, and the State of Montana had taken an indemnity selection aggregating 449.20 acres for the deficiency in section 36 caused by the presence of Big Lake. ^{1/} The United States retained no mineral interest in the indemnity lands which the State selected. By memorandum of August 6, 1975, the Chief, Mineral Adjudication Section, Montana State Office, Bureau of Land Management, transmitted the above oil and gas offers to the Chief, Branch of Cadastral Survey, requesting that the Branch of Cadastral Survey subdivide the bed of the Big Lake to determine which parts were riparian to the various abutting upland owners. This action was requested pursuant to this Board's decision in David A. Provinse, 15 IBLA 387, 81 I.D. 300 (1974), which will be discussed infra.

By notice of September 17, 1975, the BLM State Office informed the Commissioner of Lands for the State of Montana of its intention to assert mineral rights to the lakebed riparian to the uplands in section 36. By letter of October 15, 1975, the State of Montana objected to the proposed assertion of rights. By decision of October 22, 1975, the State Office dismissed the protest filed by the State of Montana and this appeal followed.

The dismissal of the protest of the State of Montana was premised on this Board's decision in David A. Provinse, supra. Provinse, a case which also arose in the State of Montana, involved lands in the bed of Horseshoe Lake riparian to a school section. Therein the Board ruled that "Montana's selection and acceptance of other lands in lieu of the lands within the meander line constituted a relinquishment of any interest in the lands

^{1/} Section 10 of the Act of February 22, 1889, 25 Stat. 676, 679, granted sections 16 and 36 in every township to the State of Montana for support of the common schools, effective upon admission as a State into the Union or upon date of survey, whichever came later. Montana became a State on November 8, 1889.

The Act of February 28, 1891, 26 Stat. 796, amended §§ 2275 and 2276, Rev. Stat., to provide, inter alia, that States could select land to compensate for the deficiency where sections 16 or 36 were fractional in quantity. Survey of T. 2 N., R. 21 E., P.M., Montana, is reflected on a plat accepted December 20, 1892. Section 36 was returned with a land area of 190.80 acres, the remainder of the rectangular area protracted for section 36 being within Big Lake, and aggregating 449.20 acres.

The State of Montana used this deficiency of 449.20 acres to satisfy the base for 321.88 acres in Indemnity List No. 3, Helena Land District, approved January 2, 1901, and for 127.32 acres in Indemnity List No. 47, Miles City Land District, approved May 23, 1923.

underlying Horseshoe Lake as included in the grant of the upland portion of the school section, or riparian thereto * * *." Id. at 399. The Board's decision was, in turn, premised on the decision of the United States Supreme Court in United States v. Oregon, 295 U.S. 1 (1935). Therein, the Supreme Court declared that:

* * * the acceptance by the State of lands elsewhere, in lieu of lands lying within the meander line adjacent to the granted uplands, was such a practical construction of the boundary, and necessarily involved such a relinquishment of any interest in the adjacent lands as to preclude the assertion of that claim here.

295 U.S. at 10-11.

[1] The State of Montana does not argue on appeal that the Board's decision in Provinse was incorrectly applied to the facts of the instant case. ^{2/} Rather, it argues that the Provinse decision incorrectly considered "indemnity selection" and "lieu selection" as interchangeable. Its argument is based on the wording of the Act of February 28, 1891, 18 Stat. 202, as amended, 43 U.S.C. § 851 (1970). Section 851 provides that upon the grant of school sections "other lands of equal acreage are hereby appropriated and granted, and may be selected * * * by said State in lieu of such as may be taken by preemption or homestead settlers." (Emphasis supplied.) The statute then provides that "the selection of any lands under this section in lieu of sections granted or reserved to a State shall be a waiver by the State of its right to the granted or reserved sections." (Emphasis supplied.) Finally the statute provides: "And other lands of equal acreage are also appropriated and granted, and may be selected, * * * by said State to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional, or from any natural cause whatever."

The State of Montana contends that the statute describes two distinct and discrete mechanisms through which the State may select lands in compensation for deficiencies in school sections: lieu selections for those lands which have been settled with a view to preemption or homestead or otherwise disposed of by the

^{2/} It is assumed, and has been assumed since the inception of the case, that Big Lake was non-navigable as of the date of the State of Montana's entry into the Union, viz., 1889.

United States; and indemnity selections to compensate for deficiencies where either the granted sections were fractional or the townships were fractional or where the sections were deficient for any natural cause whatever. The State then contends that while the statute, by its terms, requires the State to relinquish its rights when taking a lieu selection, no such waiver requirement obtains when it makes an "indemnity selection." Thus, the State concludes, it did not relinquish its rights to the bed of Big Lake riparian to the uplands of section 36 when it selected indemnity land to compensate for the deficiency in the section.

The position of the State of Montana ignores the express ruling of the United States Supreme Court in United States v. Oregon, *supra*. Even were we disposed to accept the State's construction of the statute as an initial matter, the decision of the Supreme Court precludes us from reaching the solution which the State advances. Accordingly, we reaffirm the holding of the Provinse case and expressly rule that where, as here, the State selects and accepts other lands in lieu of the lands within the meander lines of a non-navigable lake, such selection and acceptance constitutes a relinquishment of such lands riparian to the uplands of the granted school section which are within the protracted lines of the school section.

We wish to emphasize the last part of the above ruling. Where a State has sought and obtained an indemnity selection for deficiencies in a school section occasioned by the impingement of a non-navigable lake into the section, the State has waived such riparian rights which would accrue to it as the upland owner of the lands within section 36, to the extent that the lands within the bed of the lake riparian to the upland are located within the linear confines of section 36.

We note that the area described as riparian to lots 1, 2, 3 and 4 sec. 36, in the Provinse offer to lease extends beyond the projected linear boundaries of section 36. The United States can claim no right or title to any land beyond the projected linear limits of section 36, so the Provinse offer must be rejected to the extent that it describes such land. It is possible that the State of Montana, if it is the owner of lots 1, 2, 3 and 4 section 36, may have riparian rights beyond the projected linear limits of section 36, but we do not address that question. Nor do we determine if riparian rights, based on ownership of the northern or eastern banks of the lake, may invade the projected linear limits of section 36.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

We concur.

Edward W. Stuebing
Administrative Judge

Martin Ritvo
Administrative Judge

